No. 83-397

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, and EMIL R. OUIMET WAREHAM TRUST,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, AVON SOLE COMPANY, TENN-ERO CORPORATION, and HERBERT KAHN, TRUSTEES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether all members of a controlled group may be held liable under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), for the underfunding of a pension plan sponsored by one of the members, including underfunding which existed when the sponsor joined the controlled group six and one-half years prior to the termination of the plan.

2. Whether the amount of termination liability to the Pension Benefit Guaranty Corporation ("PBGC") to be borne by the solvent and bankrupt members of a controlled group, all of whom are jointly and severally liable under ERISA, may be allocated by the court of appeals so as to require the solvent entities to pay the total amount to the PBGC.

3. Whether the PBGC was entitled to assess compound interest, at market rates, on plan-termination liability which had been unpaid since 1975.

4. Whether Emil Ouimet held at least 80 percent of the ownership of Ouimet Stay & Leather Company for purposes of determining membership in the controlled group.

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BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 711 F.2d 1085. The district court's order summarily affirming the decision of the master is not reported. Earlier decisions of the district court and of the court of appeals in this litigation are reported at 470 F. Supp. 945 and 630 F.2d 4. This Court's earlier denial of certiorari is reported at 450 U.S. 914.

JURISDICTION

The decision of the court of appeals was issued on June 9, 1983. The petition for a writ of certiorari was

filed on September 7, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent sections of Title IV of ERISA involved in this case appear in the Appendix, pp. 1a-3a, *infra*.

STATEMENT

This case involves the termination of an underfunded pension plan sponsored by a bankrupt member of a group of trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b). Title IV of ERISA imposes joint and several liability, within statutory limitations, upon all members of the controlled group for the underfunding of such a pension plan. Petitioners are the solvent members of the controlled group, and they dispute their statutory liability and the assessment of interest on the liability.

1. Facts

Petitioners, Ouimet Corporation, Ouimet Stay & Leather Company, Emil R. Ouimet Wareham Trust, and Ouimet Welting Company,[1] are directly or indirectly owned and controlled by Emil R. Ouimet, a Massachusetts resident. Petitioners are all involved in shoe-related manufacturing. Respondent Avon Sole Company ("Avon") and its wholly-owned subsidiary created in 1972, Tenn-ERO, were also shoe-related manufacturers which Emil Ouimet owned and controlled prior to Avon's bankruptcy in 1975.[2] Respondent Herbert Kahn is trustee in bank-

[1] Ouimet Welting Company is a dormant corporation which has been disregarded in this litigation, and future references to petitioners exclude this company.

[2] The relationship between Emil R. Ouimet and the various related entities which are parties to this action was graphically portrayed as follows by the district court (470 F. Supp. 945, 947, n.1):

[Footnote continued]

ruptcy of Avon. Respondent PBGC is a United States Government corporation established under Title IV of ERISA to administer a program of pension plan termination insurance. The PBGC guarantees payment of basic pension benefits in defined benefit pension plans with insufficient assets to pay those benefits. 29 U.S.C. §§ 1321, 1322.

In 1968, petitioner Ouimet Corporation purchased Avon for approximately $1,200,000 (J.A. II 265).[3] Shortly thereafter, Ouimet Corporation borrowed over $750,000 from its new subsidiary in return for an unsecured note (J.A. II 116). Avon subsequently sustained losses which the profitable Ouimet Corporation deducted on a consolidated tax return (J.A. II, 31; J.A. I, Supp. 90-104).

Avon sponsored a pension plan which had been established in 1954. When petitioners acquired Avon in 1968, the pension plan was underfunded by $92,000. When the plan terminated six-and-one-half years later, the plan's insufficiency was $552,339.64. During this time Emil Ouimet was the president of Avon. He participated in labor negotiations resulting in increased plan benefits which were not thereafter fully funded. Contributions to

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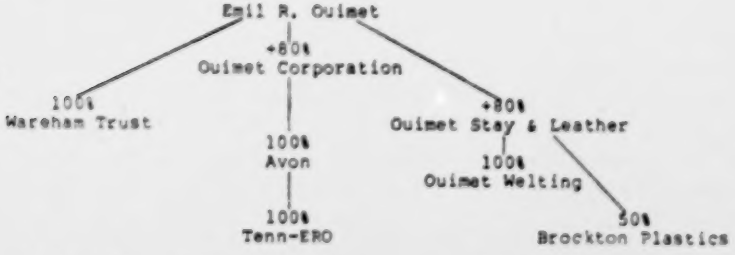
[2] [Continued]



[3] "J.A. I" refers to the Joint Appendix filed in the court of appeals on the first appeal in this case. "J.A. II" refers to the Joint Appendix filed in the court of appeals on the second appeal.

the pension plan were deducted on Ouimet Corporation's consolidated tax return.

Avon shut down its business operations on March 25, 1975, and its pension plan terminated on that date. On June 18, 1975, Avon filed bankruptcy petitions and was subsequently adjudicated bankrupt. The petitioners' operations continued to be profitable (J.A. II 250; J.A. I, Supp. 105).

In March 1976, the PBGC determined that the value of the Avon plan's guaranteed benefits exceeded the value of the plan's assets by $552,339.64. It was subsequently stipulated that the PBGC's determination was correct (J.A. II 31).

2. Proceedings Below

On April 2, 1976, the PBGC filed a civil action against petitioners to recover statutory liability with respect to the insufficiency of the plan under 29 U.S.C. §§ 1301(b), 1362. Previously, the PBGC had filed proofs of claim for the statutory liability in the Avon bankruptcy proceeding. The district court consolidated the two cases for trial before the bankruptcy judge as master, pursuant to Rule 53 of the Federal Rules of Civil Procedure.

After a 12-day trial, the master found that petitioners and Avon were trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b). However, the master concluded that only the "direct employer" of the plan's participants, which was Avon, was liable under 29 U.S.C. § 1362, because the controlled group rules of Section 1301(b) did not apply to Section 1362. The master also ruled that since Avon had no net worth, the PBGC was entitled to no recovery.

The district court accepted the master's finding that petitioners and Avon (together with Tenn-ERO) constituted one controlled group within the meaning of 29 U.S.C. § 1301(b). *PBGC* v. *Ouimet Corp.*, 470 F. Supp.

945, 947, n.1 (D.C. Mass 1979). The district court held, however, that Section 1301(b) applies to liability under Section 1362. *Id.* at 954. Consequently, petitioners and Avon were held jointly and severally liable to the PBGC. The district court rejected petitioners' claim that retroactive controlled-group liability was unconstitutional and referred the case back to the master for a determination of the group's net worth.[4] *Id.* at 954-959.

On interlocutory appeal, the decision of the district court was affirmed. *PBGC* v. *Ouimet Corporation*, 630 F.2d 4 (1st Cir. 1980) ("*Ouimet I*"). The court of appeals agreed that petitioners and Avon constituted one group under Emil Ouimet's control, and held that each member of the controlled group was jointly and severally liable to the PBGC. *Id.* at 7-12. The court of appeals relied on the constitutional ruling in *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), as to which this Court had denied certiorari, 442 U.S. 940, to reject the petitioners' argument that ERISA cannot be "retroactively" applied to impose liability on the controlled group for underfunding that predated the enactment of ERISA.[5] *Ouimet I*, 630 F.2d at 12. This Court then denied certiorari in this case on a petition which raised, *inter alia*, the constitutional "retroactivity" issue. 450 U.S. 914 (1981) (No. 80-860, O.T. 1980).

No new evidence was proffered on remand. Evidence from the earlier trial established that Ouimet Corporation is the largest manufacturer of shoe findings in the United States. The master found that the plan's insufficiency was less than 30 percent of the controlled group's

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[4] This finding was relevant because liability under Section 1362 may not exceed 30 percent of the group's net worth. 29 U.S.C. § 1362(b)(2).

[5] This Court granted certiorari on questions of statutory liability and thereafter affirmed the Seventh Circuit. 446 U.S. 359 (1980).

net worth. He also concluded that the PBGC was entitled to interest under 29 U.S.C. § 1368 at the rate established pursuant to 26 U.S.C. § 6621. He allocated the $552,339 liability among the controlled group as follows, based on the net worth of each of the entities and on the value of Avon's assets:

Ouimet Corporation	$287,497
Ouimet Stay & Leather Company	$ 95,832
Emil R. Ouimet Wareham Trust	$ 90,508
Avon	$ 78,502

The district court affirmed the master's report, and a second appeal was taken. Finding "some nuance" of a new argument presented by petitioners on the question of retroactivity, the court of appeals again sustained the district court's finding of liability. *PBGC* v. *Ouimet Corp.*, 711 F.2d 1085, 1088 (1st Cir. 1983) (*"Ouimet II"*). Pet. App. 7a-9a.

On appeal from the district court's allocation of liability among the various entities in the controlled group, the court of appeals held that the petitioners, rather than the unsecured creditors of the Avon bankruptcy estate, should pay the full amount. Pet. App. 10a-16a. The court considered the applicability of *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982), and held that *Vogel Fertilizer* did not affect the earlier finding that petitioners were within the controlled group. Pet. App. 16a-19a. Finally, the court of appeals rejected petitioners' claims that they should not be required to pay accrued interest, noting, *inter alia*, that the PBGC had already granted petitioners a one-year delay in the accrual of that interest. Pet. App. 19a-21a.

ARGUMENT

1. Rather than challenging only the alleged "retroactivity" of ERISA in its entirety—as they endeavored to do in their unsuccessful petition of three years ago—petitioners now claim, as well, that it is unconstitutional to impose upon them that portion of Avon's unfunded liability which had accrued before Ouimet Corporation purchased Avon.[6] The court of appeals correctly rejected that "nuance" of petitioners' earlier constitutional challenge, and the only authority petitioners cite to the contrary is language from an interlocutory district court decision in the same circuit that rejected the retroactivity claim in the landmark ruling of *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), *cert. denied in part*, 442 U.S. 940 (1979), *aff'd in part*, 445 U.S. 359 (1980).

The court of appeals correctly observed that Congress did not prescribe, and the Constitution does not require, "a dollar by dollar accounting of the financial benefits controlled group members have realized as a result of their affiliation with the terminating employer" (Pet. App. 8a). In fact, the "realities of business affiliation" provided significant benefits following the purchase of Avon, such as lower taxes and cash availability. Moreover, regardless of whether benefits are received by affiliates, the owners of controlled groups in general are able to control the pension decisions of members of the group. Consequently, Congress' imposition, upon the entire controlled group, of liability for Avon's existing pension-plan underfunding was reasonable. Indeed, if the PBGC, rather

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[6] Courts of appeals have consistently rejected constitutional challenges on retroactivity grounds to employer liability under 29 U.S.C. § 1362. *E.g.*, *Concord Instruments Corp.* v. *PBGC*, 647 F.2d 701 (6th Cir. 1981), *cert. denied*, 454 U.S. 1054 (1981); *A-T-O, Inc.* v. *PBGC*, 630 F.2d 1013 (6th Cir. 1980); *In re Williamsport Milk Products Co. Inc. Retirement Plan for Salaried Employees*, 631 F.2d 726 (3d Cir. 1980). To the extent that the present petition again raises that issue, it repeats a claim that has been uniformly disapproved.

than petitioners, were compelled to bear the cost of the unfunded vested benefits in Avon's terminated plan, that expense would be passed along to businesses throughout the country through mandatory Title IV premiums. It was surely rational and constitutional for Congress to assign that burden to the entire controlled group rather than to spread it among businesses which have never had any relation whatever to the terminated plan or the company which sponsors it. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976).

The interlocutory decision in *PBGC* v. *Anthony Co.*, 537 F. Supp. 1048 (N.D. Ill. 1982), which has not been followed in any other jurisdiction, hardly justifies review of the present ruling. The ultimate ruling or practical effect of *Anthony* clearly will not be known until a final judgment is rendered in that case. Accordingly, the conflict is truly between decisions of courts of appeals and an interlocutory finding by a district court.[7]

2. The second question presented in the petition is one on which the PBGC has taken no position—whether Avon's bankruptcy estate must ultimately contribute to, or indemnify, the petitioners for a share of the liability to the PBGC. The court of appeals unequivocally held in *Ouimet I* that *all* members of the controlled group, whether bankrupt or solvent, were jointly and severally liable to the PBGC as a "single employer." *Ouimet I*, 630 F.2d at 8-12. The issue of joint and several liability was not argued in *Ouimet II*, and the earlier holding was reaffirmed.[8] Consequently, the PBGC may choose to re-

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[7] The retroactivity question presented here should not be confused, of course, with retroactivity issues raised under the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208. *E.g.*, *PBGC* v. *R.A. Gray & Co.*, Jurisdictional Statement pending, No. 83-245. The Avon plan was not a multiemployer plan, and the 1980 amendments do not affect this case.

[8] Petitioners err in asserting in their second Question Presented that the court of appeals "excluded the bankrupt members from . . . liability." The court said:

cover from the bankrupts, and the bankrupts could then, under *Ouimet II*, recover any amount they paid to the PBGC from the petitioners.

In determining what rights the various members of the controlled group have *inter se*, the court of appeals concluded that "[u]nder these circumstances" of this particular case (Pet. App. 15a), "the solvent members of the Ouimet Group, and not Avon's creditors, should bear responsibility for the liability to PBGC . . . ." (Pet. App. 13a). This decision was limited to the unique facts of this case. Although petitioners disagree with the result reached by the court of appeals (Pet. 18-23), they suggest no alternative formula other than a vague reference to "benefits received" by the members of the controlled group (Pet. 20). Nor do petitioners cite any conflicting authority. Hence, there is no need to review any issue relating to allocation at the present time.

3. Petitioners' efforts to convert their liability to the PBGC since 1975 into a low-cost government loan by eliminating or drastically reducing the PBGC's demand for interest were properly rejected by the court of appeals. Petitioners have cited no decision of this Court or of any court of appeals to support their challenge to the PBGC's rules computing the interest due on unpaid obligations.

Termination insurance is funded through mandatory premiums paid by statutorily defined plans and by em-

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[T]he provisions of 29 U.S.C. § 1368 (1976 & Supp. V. 1981) which in essence created a lien similar to a tax lien, evidence the intent of Congress that *as between PBGC and the bankrupt employer's creditors the termination liability should be absorbed by the creditors.* These provisions do not support the conclusion that as between controlled affiliates who are to be treated as a single employer and the direct employer's creditors the loss is to be absorbed by the creditors. [Pet. App. 13a, emphasis added]

Thus, the court assumed the liability of the bankrupt members, but was then asked to decide the ultimate allocation of joint and several liability.

ployer liability. Immediate investment of funds collected by the PBGC substantially reduces the premium burden on the nation's businesses. *See* 29 U.S.C. § 1305(b)(3). If interest were not collected, delays in the payment of premiums and employer liability to the PBGC would sharply increase ERISA's insurance premiums, contrary to Congress' stated intention. *See* 29 U.S.C. 1302(b)(2). In addition to loss of investment earnings, litigation and other collection costs would rise sharply, since there would be little incentive for timely payment. This would increase the potential for delaying payment to the PBGC, notifying the PBGC of plan terminations, and providing the PBGC with necessary records.

Congress provided that interest is to be paid upon unpaid premiums under 29 U.S.C. § 1307(b), and upon unpaid employer liability under 29 U.S.C. § 1368(a). Private debt to the government should not be subject to interest at less than the going market rate. If it were, private parties could finance their administrative and judicial litigation at the public's expense. Contested cash on hand could be used, at low interest rates, to reduce the need to borrow at the higher market rates. It would be financially advantageous to delay payment to the government, regardless of the merits of a case. For this reason, 29 U.S.C. § 1307(b) specifies that, pursuant to 26 U.S.C. §§ 6601, 6621, the interest rate on unpaid premiums approximates short-term market interest rates.

Although Section 1368(a) (which governs unpaid employer liability), unlike Section 1307(b), does not specify the interest rate or whether there may be a penalty for late payment, Congress' desire to keep premiums low and to maintain uniformity in the collection of obligations to the government was surely sufficient basis for the PBGC to adopt the market rate.

Nor is there merit to petitioners' objection to the annual compounding of interest prior to 1983. The prohibi-

tion against compounding in the Internal Revenue Code did not apply to employer liability under Title IV of ERISA. 26 U.S.C. § 6601(f)(2) (Supp. 1980). And annual compounding cannot be deemed a "penalty" in view of the common practice of daily compounding. Nor is the issue of any continuing importance. Both the Internal Revenue Code and PBGC regulations have been amended, effective January 1, 1983, to provide for daily compounding in conformity with market practice. 26 U.S.C. § 6622; 47 Fed. Reg. 55670 (Dec. 13, 1982).

Finally, it is unsound to argue, as petitioners do, that the 30 percent net worth limitation upon employer liability in 29 U.S.C. § 1362(b)(2) must apply to the *total* of principal liability and interest. Such a rule would entitle certain employers to interest-free loans at the public's expense, would provide other employers with an incentive for delaying payment until the 30 percent ceiling is reached by the total of principal and interest (after which the obligation would be interest-free), and would not be supported by a fair reading of the statute. In the absence of conflicting decisions, no review of this issue is warranted.

4. Petitioners' final claim is that Ouimet Stay and Leather Company was improperly included in the controlled group because Emil Ouimet owned only 79.2 percent of that company directly, and "attribution" to him of 13 shares owned by his wife and his father's estate was erroneous. Petitioners claim that the decision of the court below to the contrary is inconsistent with *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982). This argument ignores, however, the stipulation that Emil Ouimet was owner of record not only of 79.2 percent of the outstanding shares, but also *actual* owner of 36 more shares listed under other names (J.A. II 33-35). Thus, regardless of the attribution rules, the statutory minimum was satisfied.

Moreover, the master initially found that Emil Ouimet owned more than 80 percent of the company, and the district court agreed in 1979. 470 F. Supp. at 947, n.1, 948. The court of appeals then affirmed in *Ouimet I*, 630 F.2d at 7. Mr. Ouimet's 80 percent ownership thus was resolved for purposes of this case, irrespective of any later decision by this Court in a supposedly analogous area.

Finally, *Vogel Fertilizer* did not affect the attribution rules. *Vogel Fertilizer* invalidated a *regulation* which was inconsistent with the governing statute. 102 S.Ct. at 828. In this case, the governing *statute* provides that stock ownership is augmented through attribution rules, such as husband-wife attribution (26 U.S.C. § 1563(e)(3)) and estate-beneficiary attribution (26 U.S.C. § 1563(e)(5)). 26 U.S.C. § 1563(d). Consequently, *Vogel Fertilizer* is inapposite.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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29 U.S.C. § 1301(b) (1976)

(b) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the [PGBC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

29 U.S.C. § 1307(b) (1976)

If any basic benefit premium is not paid when it is due the [PBGC] is authorized to assess a late payment charge of not more than 100 percent of the premium payment which was not timely paid. The preceding sentence shall not apply to any payment of premium made within 60 days after the date on which payment is due, if before such date, the plan administrator obtains a waiver from the [PBGC] based upon a showing of substantial hardship arising from the timely payment of the premium. The [PBGC] is authorized to grant a waiver under this subsection upon application made by the plan administrator, but the [PBGC] may not grant a waiver if it appears that the plan administrator will be unable to pay the premium within 60 days after the date on which it is due. If any premium is not paid by the last date prescribed for a payment, interest on the amount of such premium at the rate imposed

under section 6601(a) of Title 26 (relating to interest on underpayment, nonpayment, or extensions of time for payment of tax) shall be paid for the period from such last date to the date paid.

29 U.S.C. § 1362(a)-(c) (1976 and Supp. V 1981)

(a) This section applies to any employer who maintained a single-employer plan at the time it was terminated . . . .

• • • •

(b) Any employer to which this section applies shall be liable to the [PBGC], in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the [PGBC] but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

(c) For purposes of subsection (b)(2) of this section the net worth of an employer is—

(1) determined on whatever basis best reflects, in the determination of the [PBGC], the current status of the employer's operations and prospects at the time chosen for determining the net worth of the employer, and

(2) increased by the amount of any transfers of assets made by the employer determined by the corporation to be improper under the circum-

stances, including any such transfers which would be inappropriate under Title 11 if the employer were a debtor in a case under chapter 7 of such title.

29 U.S.C. § 1368 (1976 and Supp. V 1981)

(a) If any employer or employers liable to the [PGBC] under section 1362, 1363, or 1364 of this title neglect or refuse to pay, after demand, the amount of such liability (including interest), there shall be a lien in favor of the [PGBC] upon all property and rights to property, whether real or personal, belonging to such employer or employers.

(b) The lien imposed by subsection (a) of this section arises on the date of termination of a plan, and continues until the liability imposed under section 1362, 1363, or 1364 of this title is satisfied or becomes unenforceable by reason of lapse of time.

* * * *

(c)(2) In the case under Title 11 or insolvency proceedings, the lien imposed under subsection (a) of this section shall be treated in the same manner as a tax due and owing to the United States for purposes of Title 11 or in section 191 of Title 31.

* * * *

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